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CITATIONS

747-974—64——1

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. ——

FEDERAL TRADE COMMISSION, PETITIONER

v.

MARY CARTER PAINT CO., JOHN C. MILLER, I. G. DAVIS, JR., AND ROBERT VAN WORP, JR.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the Federal Trade Commission, petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit entered in the above cause on June 19, 1964.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 16–29) is reported at 333 F. 2d 654. The opinion of the Federal Trade Commission (R. 55–91)[1] is not yet officially reported. The initial decision and order of the hearing examiner are printed at R. 28–54.

JURISDICTION

The judgment of the court of appeals was entered on June 19, 1964 (App. B, *infra*, pp. 30–31). On Sep-

[1] "R." refers to the printed record in the court of appeals, nine copies of which are being filed herewith.

tember 17, 1964, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to and including October 15, 1964, and on October 14, 1964, he further extended the time for filing to and including October 26, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Federal Trade Commission exceeded its authority in holding it to be an unfair or deceptive act or practice, violating Section 5 of the Federal Trade Commission Act, for a seller regularly to advertise that the purchaser of a single unit at a stated price will receive a second unit "free," when in fact the stated price has always been his regular price for two units.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended by the Act of March 21, 1938, 52 Stat. 111, 15 U.S.C. 45, provides in part as follows:

> (a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> * * * * *
>
> The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

STATEMENT

The essential facts are undisputed. Respondent Mary Carter Paint Company ("Mary Carter") manufactures paint and sells it to the public through more than 500 retail outlets (which are wholly-owned) and through franchised dealers located in 28 eastern and southern States (RX 2, pp. 3, 6).[2] In 1960 its sales totaled $12,000,000 (R. 20).

From the time it began business in 1951, Mary Carter, as an established and permanent policy, has advertised that for every can of paint purchased it will give the purchaser a "free" can of equal quality and quantity (RX 2, p. 3; R. 124). Examples of such advertising are:

> "Buy one get one free" (RX 23; CX 29)
> "Every 2nd can Free of extra cost" (CX 2, CX 8)
> "Buy only half the Paint you need" (CX 5)
> "Acrylic Rol-Latex * * * $2.25 qt. $6.98 gal. every 2nd can free" (CX 41, CX 45)

While Mary Carter sells different types of paint, much of it is advertised at $2.25 per quart or $6.98 per gallon (*e.g.* CX 45, CX 47, CX 49). A purchaser thus receives two quarts for $2.25 or two gallons for $6.98.

The policy of the company is to charge the advertised price whether or not the purchaser takes the "free" can (R. 22–23, 96, 206–207). One who bought

[2] "RX" refers to respondents' exhibits and "CX" to Commission exhibits. The exhibits are contained in the "Joint Record Exhibits" compiled for the court below in a separate volume from the "Printed Record."

a gallon can and rejected the accompanying free gallon would have to pay $6.98 but if he really wanted only one gallon, he could purchase two quart cans at $4.50 and receive two quarts "free," thus paying $4.50 for a gallon. The record indicates that a purchaser paying $4.50 for four quarts sometimes was given a gallon can (R. 46, 106; CX 67, pp. 50–51).

On February 15, 1961, the Federal Trade Commission issued a complaint against Mary Carter charging that its advertising was false and misleading, in violation of Section 5 of the Federal Trade Commission Act (R. 6, 10–11).[3] After full administrative proceedings the Commission (Commissioner Elman dissenting) held that Mary Carter had engaged in misleading advertising, and issued a cease-and-desist order (R. 53–54, 56–91). The Commission stated that although there had been a "few isolated instances" where a purchaser paid the unit price but took only one can of paint, Mary Carter "usually and customarily" had "sold two cans of paint for the so-called single can price"; and it agreed with the examiner's finding "that the amount designated in respondents' advertising as the price for a can of Mary Carter paint is not the usual and regular price per single can but the usual and regular price for two cans" (R. 65; see R. 52, 58). The Commission further held (R. 60–64, 66–67) that neither its rules governing the use of the word "free" in advertising

[3] The complaint also named as respondents three individuals who were at the time, or had been, officers of Mary Carter. The complaint was dismissed against two of them (R. 32–33, 53–54).

nor Guide V of its Guides Against Deceptive Pricing, in effect at that time, justified Mary Carter's advertising. See discussion *infra*, pp. 8–14.[4]

The Commission's order directed Mary Carter to cease and desist from representing (a) that the price of a product is "respondents' customary and usual retail price" when that price is greater than the price "at which such merchandise is customarily and usually sold by respondents at retail", and (b) that an article is being given free "or without cost or charge, when such is not the fact" (R. 53).

The court of appeals set aside the Commission's order and ordered the complaint dismissed. (App. A, *infra*, pp. 16–29.) The court, "adopt[ing] and approv[ing] the reasoning and the result" in Commissioner Elman's dissenting opinion (*id.*, p. 23), held that the Commission had failed to explain what was unfair or deceptive about Mary Carter's advertising, and had departed from its established rules governing the use of the word "free" in advertising. The court further ruled that the cease-and-desist order was impermissibly vague.

REASONS FOR GRANTING THE WRIT

This case presents an important question involving the authority of the Federal Trade Commission to prohibit the misleading use of the word "free" in the advertising of goods for sale. Slogans such as "buy

[4] The Commission also upheld the examiner's exclusion of evidence offered by Mary Carter to show the quality of its paint, as irrelevant to the issue whether its advertising was deceptive (R. 67–68).

one-get one free" are commonplace in modern advertising. The Commission here held that a firm which always sells its product on such a "two-for-one" basis is not offering the second unit "free," but is selling two units at the stated price; and that its use of the word "free" therefore is an unfair or deceptive act or practice in violation of Section 5 of the Federal Trade Commission Act. The court of appeals' reversal of that holding casts serious doubt upon the Commission's authority to prohibit such misleading advertising at all, and at the very least, engenders considerable uncertainty in this important area of the Commission's work. The problem is particularly acute because the Commission has at least 15 pending investigations, involving various industries, into advertising which states that the seller is giving a "free" item with the purchase of other items at a designated price, whereas in fact the "free" and the other items always are sold together in a single package at that price. In addition, the decision, by giving a "green light" to Mary Carter's practices, is likely to spawn further misleading advertising of this character. A court of appeals decision which portends such serious consequences and which, we submit, is erroneous warrants review by this Court.

1. The Commission correctly concluded that Mary Carter engaged in false and deceptive acts and practices by regularly and customarily advertising that if one gallon of paint is purchased at $6.98, another gallon is supplied "free." The necessary implication of this advertising is that the customary price of the

paint is $6.98 per gallon, and it induces the customer to believe that Mary Carter is offering him two cans of paint for a price at which it would ordinarily sell only one. The advertising is pointless if that is not the effect. In fact, this representation is false, since Mary Carter admittedly always sold two gallons for $6.98; and its falsity is not disproved because, if someone wanted a gallon of paint *in a single can,* he would ordinarily have to pay $6.98 whether or not he also accepted the second can.[5] In truth, Mary Carter is not selling paint at $6.98 a gallon and giving a second can free; it is selling a package of two gallons for $6.98. The company's initial decision to sell on that basis necessarily reflected its belief that it could profitably sell paint at $3.49 a gallon. While sophisticated purchasers who read Mary Carter's advertisements might realize that this "two-for-one" selling was the company's regular policy, "[t]he law is not made for the experts but to protect the public,—that vast multitude which includes the ignorant, the unthinking and the credulous, who, in making purchases, do not stop to analyze but too often are governed by appearances and general impressions" (*Aronberg* v. *Federal Trade Commission,* 132 F. 2d 165, 167 (C.A. 7)). It is the misrepresentation that $6.98 was the usual price for a gallon of paint that constitutes the unfair and deceptive practice.

[5] If he wanted only one gallon of paint, he would ask for four quart cans, paying $4.50 instead of $6.98 (R. 96–97). He sometimes might be given the four quarts in a gallon can. See *supra,* p. 4.

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The Commission's ruling accords with *Federal Trade Commission* v. *Standard Education Society*, 302 U.S. 112. In that case the company made a practice of representing that the purchaser of a supplement to the encyclopedia would receive the encyclopedia "free," whereas in fact the price covered both the supplement and the encyclopedia. The court of appeals struck down the finding that the representation violated the Act, on the ground that a purchaser of both would be unlikely "to be misled by the mere statement that the first are given away, and that he is paying only for the second. * * * Such trivial niceties are too impalpable for practical affairs, they are will-o'-the-wisps, which divert attention from substantial evils." *Federal Trade Commission* v. *Standard Education Society*, 86 F. 2d 692, 696 (C.A. 2). This Court reversed that holding, stating (302 U.S. at 116):

> The fact that a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive others less experienced. * * *

By the same reasoning, Mary Carter engaged in false and deceptive advertising when it represented that one can of paint is "given away, and that [the buyer] is paying only for the second."

2. Fairly read, the Commission's decisions since *Walter J. Black, Inc.*, 50 F.T.C. 225, upon the use of the word "free" in advertising, have followed a consistent course which has apparently been under-

stood by most of the business community. The decision below, we respectfully submit, is a source of confusion.

In *Walter J. Black, Inc.*, the Commission reviewed the entire problem of the use of the word "free" in advertising, and took as its major premise the following paragraph from the government's brief in this Court in *Federal Trade Commission* v. *Standard Education Society, supra* 50 F.T.C. at 234–235:

> When such an offer of a gift is made, the customer understands from the use of the word "gift" that an article is to be received without any payment being made for it. If he is told that it is to be received "Free of Charge" if another article is purchased, the word "free" causes him to understand that he is paying nothing for that article and *only the usual price for the other.* If this is not the true situation, there is no free offer and a customer is misled by the representation that he is to be given something free of charge. [Emphasis added.]

The Commission went on to say that the "essence of this opinion is that there must be truth in advertising to support the use of the word 'free.' If an advertiser either lies as to the facts or tells only part of the truth in his advertising, and such lies or omissions have the tendency or capacity to mislead or deceive the public, this Commission * * * must inhibit such use of the word 'free' in advertising."

The Commission then addressed itself to circumstances in which the use of the word "free" would

be unfair: (a) where all the conditions for receipt of the free article were not clearly and conspicuously explained or (b) when the offerer—

> either (1) increases the ordinary and usual price; or (2) reduces the quality; or (3) reduces the quantity or size of such article of merchandise.[6]

The quoted passage relates to a situation in which the seller has been marketing an article at a regular price and wishes to offer a "free" bonus. That was the situation in the case before the Commission, for Walter J. Black, Inc. was offering new members of the book club "free" books if they would pay the same price at which the purchased books were sold to old members. Furthermore, the price paid for the purchased books was no higher than the established price for those books in book stores. The same was true in *Book-of-the-Month Club, Inc.*, 50 F.T.C. 778.

Conversely, the passage quoted from *Black* obviously was not directed to the situation in which a seller normally sells his products in pairs. If the seller does not have an ordinary and usual price for a single unit, it is just as deceptive for him to advertise "Buy one for $2, and get one free" as it would be for him to raise an established regular price from $1 to $2 and then make the same claim. In each case he would be impliedly representing that the advertised price of the single unit was its regular price,

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[6] Commissioner Elman's dissenting opinion (R. 79) distorts the above test by omitting all reference to "the ordinary and usual price," which is the key to all the pronouncements on the subject.

whereas in fact it was not; that the buyer was getting something he would ordinarily have to pay for; and that the extra was, in that sense, free. Since in the present case Mary Carter's implied representations to that effect are false, Mary Carter's practice violates the clearly-stated general principle of the *Black* opinion—"that there must be truth in advertising to support the use of the word 'free.'"

If there could be any doubt upon this point, it was put to rest by Guide V of the Commission's Guides Against Deceptive Pricing. The Guide, adopted in October 1958 and still in effect at the time of the Commission's opinion, provided (R. 63):

> No statement or representation of an offer to to sell two articles for the price of one, or phrase of similar import, should be used unless the sales price for the two articles is the advertiser's usual and customary retail price for the single article in the recent, regular course of his business.[7]

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[7] Guide IV of the Commission's current Guides Against Deceptive Pricing, which became effective January 8, 1964, provides:

"Frequently, advertisers choose to offer bargains in the form of additional merchandise to be given a customer on the condition that he purchase a particular article at a price usually offered by the advertiser. The forms which such offers may take are numerous and varied, yet all have essentially the same purpose and effect. Representative of the language frequently employed in such offers are 'Free,' 'Buy One—Get One Free,' '2-For-1 Sale,' 'Half Price Sale,' '1¢ Sale,' '50% Off,' etc. Literally, of course, the seller is not offering anything 'free' (i.e., an unconditional gift), or ½ free, or for only 1¢, when he makes such an offer, since the purchaser is required to purchase an article in order to receive the 'free' or '1¢' item. It is

Taken by itself this statement unequivocally condemns Mary Carter's advertising. Surely it will not be claimed that the fact that Mary Carter will sell a gallon of paint in a single can for $6.98, if the customer refuses to take the second gallon, is enough to make $6.98 its "usual and customary" retail price for a gallon of paint, when in fact every customer has always been able to get two gallons for that price or a single gallon in four quart cans for $4.50.

Guide V is accompanied by the following note:

> (Note: Where the one responsible for a "two for the price of one" claim has not previously sold the article and/or articles, the propriety of the advertised price for the two articles is determined by the usual and customary retail price of the single article in the trade area, or areas, where the claim is made.)

The note is inapplicable to respondents' practice for two reasons. First, it has no application to a new,

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important, therefore, that where such a form of offer is used, care be taken not to mislead the customer.

"Where the seller, in making such an offer, increases his regular price of the article required to be bought, or decreases the quantity and quality of that article, or otherwise attaches strings (other than the basic condition that the article be purchased in order for the purchaser to be entitled to the 'free' or '1¢' additional merchandise) to the offer, the consumer may be deceived.

"Accordingly, whenever a 'free,' '2-for-1,' 'half price sale,' '1¢ sale,' '50% off' or similar type of offer is made, all terms and conditions of the offer should be made clear at the outset."

This Guide, like the prior Guide V discussed in the text, rests upon the basic premise that it is deceptive to misrepresent, explicitly or impliedly, that the selling price in connection with which the "free" item is offered is the "price usually offered by the advertiser."

non-fungible product such as paint, where there are wide variations in the products offered by different sellers and the newcomer cannot be said to be selling the article or articles at the "customary retail price" at which the article was sold by others. The note is directed to situations in which the newcomer offers a specific product that he has not sold before but that others have sold, as would happen if a filling station were to commence handling a brand of tires it had not theretofore carried, although they were sold by others. In such a case the price charged by other sellers of the brand might be fairly used to determine the validity of the new seller's "two for one" offer.

Second, the note is addressed only to introductory offers by one breaking into the market. Remembering that it is a note and subordinate to the Guide itself, it cannot fairly be supposed that the Commission intended to authorize sellers to engage in Mary Carter's practice of representing that it was giving two articles for the price at which it usually sold one whereas in fact it had, and would always sell the two for the price of one. So read, the subordinate note would overturn the Guide itself.

Finally, we should point out that even if the note to Guide V were intended to read on Mary Carters' practices, that interpretation would not justify the decision of the court below ordering dismissal of the complaint. At worst, the case should have been remanded to the Commission to hear the proffered testimony upon whether Mary Carter's prices were in fact "the usual and customary retail price" for paint

of similar qualities. The burden would be on respondents to prove real comparability.

In sum, the net effect of the Commission's decisions beginning with *Walter J. Black, Inc.* and extending through the present case has been to permit the use of the word "free" where all the conditions of the offer were clearly and conspicuously explained, and where the "free" article was given on some extraordinary occasion along with the purchase of other articles at the usual price. That is the essential characteristic of the Book Club advertising, penny sales, and similar practices mentioned by the court below. In the light of commercial practice, such advertising could well be regarded as within a widely understood meaning of the adjective "free." There is no suggestion, however, in any of the opinions that the aim of the Commission was to permit a seller regularly and consistently to charge a usual price for the combined group of articles and then advertise that it was charging for some and giving away others "free."

The Commission does not intend to modify *Walter J. Black* and made no modification in the present case.[*]

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[*] Commissioner Elman's dissenting opinion and the respondents have placed great emphasis upon a sentence in the Commission's opinion reading (R. 67)—

"The cost of the second can of paint was included in the price paid by the purchaser, and this second can, therefore, was not given as a gift or gratuity or free of charge to the petitioner."

But that sentence must be read in conjunction with the other two sentences in the same paragraph which emphasize that the Commission is speaking only of a case in which the "free" can is not given as something extra or free of charge with a purchase at the "usual and regular" price, because there was no usual and regular price for a single can.

CONCLUSION

The petition for a writ of certiorari should be granted.*

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

JAMES MCI. HENDERSON,
General Counsel,
Federal Trade Commission.

OCTOBER 1964.

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*If the Court grants the petition and upholds the Commission's position on the merits, the Commission believes that it would be appropriate to remand the case to it for clarification of its order.

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APPENDIX A

In the United States Court of Appeals for the Fifth Circuit

No. 19982

MARY CARTER PAINT CO., A CORPORATION, JOHN C. MILLER AND I. G. DAVIS, JR., AS OFFICERS OF SAID CORPORATION, AND ROBERT VAN WORP, JR., PETITIONERS

versus

FEDERAL TRADE COMMISSION, RESPONDENT

Petition for Review of an Order of the Federal Trade Commission

(June 19, 1964.)

Before HUTCHESON and BROWN, Circuit Judges, and CHRISTENBERRY, District Judge.

HUTCHESON, Circuit Judge: This case is before the court on a petition to review and set aside a Federal Trade Commission order directing petitioners to cease and desist from engaging in certain unfair and deceptive practices and unfair methods of competition in connection with the interstate sale of paint.

The Commission's complaint charged that petitioners, in connection with the interstate sale of paint, had published advertisements which falsely represented "that the usual and customary retail price of each can * * * is the price designated in the advertisement; that this advertised price is a factory price; and that if one can * * * is purchased at the

advertised price, a second can will be given 'free' * * *". In their answer, petitioners admitted the publication of the advertisements, but denied the misrepresentations alleged.

The undisputed facts as developed at the hearings before a hearing examiner of the Commission are set out in the margin.[1]

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[1] As pertinent, these are the facts:

Mary Carter Paint Co. is engaged in the business of manufacturing, selling, and distributing paint under the trade name of "Mary Carter". At the time of the hearings, the company distributed its paints in more than 27 states of the United States through over 500 retail outlets, including both company stores and franchise dealers. Although still a small company in the paint industry (its share of national paint sales is under one percent), the company has increased its sales from one million dollars in 1955 to twelve million dollars in 1960, a growth achieved by increasing the number of retail outlets and building the repeat business of satisfied customers.

The basic business policy of Mary Carter, consistently followed over the past ten years, has been to manufacture and sell paint of high quality at a net cost to the consumer of half the amount he would pay for paint of comparable quality manufactured by leading national brand companies. This policy of giving "double value" is carried out in a merchandising practice of pricing a can of Mary Carter paint at a price comparable to the price of national brand paints of comparable quality, and advertising and giving the purchaser a second can free. Thus, typical Mary Carter advertising in newspapers, magazines, radio, television, store signs, lithographed can tops, and truck sides, states: "Buy One, Get One Free"; "Every Second Can Free of Extra Cost"; "Every Second Can Free".

Mary Carter's merchandising policy and the reason for it are specifically stated in advertisements which explain that Mary Carter paint is "quality priced" and that the company will not "second rate" its paint with a low-price tag—a point of particular importance in a market in which the leading paint manufacturers have combined in a sustained publicity campaign to inculcate a public psychology equating quality with price. [Evidence on this latter point was excluded below, and

After hearing the evidence, the hearing examiner issued his decision wherein he found that petitioners had not misrepresented that their advertised price was a factory price, but had misrepresented the usual and regular price of their paint and had falsely represented that a second can was given free with every can purchased. Accordingly, he issued an order to cease and desist, designed to prohibit the practices found to be violations of the Federal Trade Commission Act.

On review, the Commission accepted the examiner's holding that Mary Carter's advertising was not per-

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the petitioner here urges that such exclusion was erroneous.]

The quality of Mary Carter paint is not questioned. Indeed, at the hearing, Commission counsel contended that the quality of Mary Carter paint was not an issue, and the hearing examiner ruled that the evidence offered on the subject by Mary Carter was immaterial. The Commission has upheld that ruling. The evidence was taken for reporting, however, and both the evidence and the examiner's report of the evidence establish that Mary Carter paints are as good as, or superior to, paints marketed under leading national brand names at prices comparable to the single can price of Mary Carter paints. [The exclusion of this evidence constitutes one of petitioners' exceptions to the decision below.]

In accordance with Mary Carter's consistent merchandising practice, the single can price of its paint is the advertised price for a single can and the only price at which Mary Carter paint can be purchased, the purchaser being entitled to receive without extra cost a second can of the same kind of paint or of any other similarly or lower priced Mary Carter paint. Naturally, the purchaser will usually take the second can, but this is optional with him; at times he takes only the single can, and the price paid is the same single can price.

There was no evidence, at the hearing, of consumer complaints or of any deception of Mary Carter customers. The extent of consumer satisfaction with Mary Carter paints and with the value offered and given is indicated, however, by the company's increased sales and, particularly, its repeat-customer sales.

missible because the "free" second can of paint was not a gift or gratuity, though the Commission felt obliged to state in its decision that it did not thoroughly understand the hearing examiner's reasoning on this point, and in a detailed opinion [2] modified, and as modified adopted as its own, the initial decision and the order to cease and desist contained therein. Commission[er] Elman filed a dissenting opinion.

It is the contention of petitioners: that the decision of the Commission is wholly unsupported by and not in accordance with the probative and substantial evidence and the law of the case; that on the one material issue of whether and how the advertising is misleading or deceptive there is no supporting finding; and that the decision of the Commission is arbitrary and capricious and not in accordance with law. Petitioners also contend that there were substantial errors in the exclusion of material evidence and that the order entered is too vague and imprecise to be meaningful, and that all of these are grounds for review and reversal by this court under the provisions of the Administrative Procedure Act, 5 U.S.C. Secs. 1006–9.

As to the order [3] itself, it is petitioners' contention that it is no more than a generality of legal state-

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[2] *In the Matter of Mary Carter Paint Co., Inc. et al.* * * * FTC * * * (628–62).

[3] The order entered would prohibit Mary Carter from representing "directly or by implication":

"(a) That any amount is [its] customary and usual retail price of any merchandise when said amount is in excess of the price at which such merchandise is customarily and usually sold by [it] at retail in the recent and regular course of business;

"(b) That any article of merchandise is being given free or as a gift or without cost or charge, when such is not the fact";

ment which lacks any precision of meaning adequate to satisfy the requirement of clarity and applicability which the Supreme Court has said is the essence of a Commission order. *F.T.C.* v. *Henry Broch, Inc.*, 368 U.S. 360. For the reasons and upon the considerations hereafter stated, we agree.

The complaint and opinion of the Commission, Commissioner Elman dissenting, is that the second can is not "free" because it is not a "gratuity", that is the purchaser must buy one can to get the second can free, hence the cost of the second can is included in the price of the first can and the price paid is therefore the price of two cans rather than one can; and that it is misleading or deceptive to advertise that the second can is "free". The case, therefore, turns on and revolves entirely around Mary Carter's use of the word "free" in its advertising. There is no question or issue as to the quality of Mary Carter paint or as to the double value which it gives the public. The claim of the Commission is, however, that there is something misleading or deceptive in Mary Carter's expressing and advertising the bargain given in the terms of every second can "free".

The petitioners insist: that the opinion of the Commission is a mere quibble and in addition it is contrary to its established and long time rulings; that in *Matter of Walter J. Black,* 50 F.T.C. 225 (1953) and *Matter of Book-of-the-Month Club,* 50 F.T.C. 778 (1953), the Commission held that just such a bargain as Mary Carter gives can be expressed and advertised in the terms of a second article "free" with the purchase of one article; and that the Commission enunciated that rule after the most careful consideration and rejection of the argument which it now advances, that the second article could not be considered "free" because acquisition of the second ar-

ticle required the purchase of an article and hence there was no gratuity in the giving of the second article. In short, the transaction is the same as the well-nigh universal one cent sale practice where the merchants advertise that if you buy one article you can get another of the same article for one cent.

The majority opinion of the Commission states that the facts in this case are distinguishable from the facts in the *Black* and the *Book-of-the-Month* cases. Petitioner, however, and we, as the reviewing court, are in the fortunate situation in this case that Commissioner Elman, speaking not as the scribes and pharisees and the bureaucrats do, but as one having authority, has clearly, vigorously and incontrovertibly pointed out in his dissenting opinion the fallacious and quibbling nature of the majority's effort to support its position and to distinguish the cited cases.

Further, Commissioner Elman rightly noted, as "perhaps the most serious deficiency in the majority opinion", that "nowhere does the Commission explain what was 'unfair or deceptive' about what Mary Carter did"; and finally Commissioner Elman found the order issued by the Commission so "indefensibly vague" and "puzzling" that he did not know how respondents could comply with it. It should be added that Commissioner Elman also aptly and devastatingly observed, "As a result, uncertainty and confusion are being introduced, needlessly and unsettingly, into an area of business activity where businessmen and the bar have long and correctly regarded the Commission's position as definite and clear".

Contrary to the tone and tenor of most dissenting opinions, Commissioner Elman's opinion, instead of being a polemic directed as sustaining his own con-

trary view, is devoted to a careful, thoughtful and positive demonstration that the Commission, in reaching its conclusion, had devoted its efforts to tithing mint, anise and cummin, while neglecting and disregarding the weightier things of the law.

We find ourselves in agreement with Commissioner Elman's dissenting opinion: that the opinion of the Commission is completely erroneous; and that its order is lacking in the precision and definiteness which the statute requires of such an order as this. We reject, as Commissioner Elman does, the Commission's opinion: that Mary Carter's advertising is misleading because "The second can of paint was not, and is not now free"; that it was not, and is not now given without cost to the retail purchaser since the purchaser paid the advertised price; and that this was, and is now, the usual and regular retail price at which two cans of Mary Carter paint were ordinarily sold.

In short, we agree with Commissioner Elman's demonstration that in sustaining the complaint in this case and holding that Mary Carter's advertising is misleading and deceptive in the respects alleged, it is clear that the Commission has departed from its established rules, on which Mary Carter had "every right to rely", and has reverted to its discarded reasoning in the first *Book-of-the-Month Club* case. "This", as Commissioner Elman observes, "it has not done forthrightly", however, but by purporting to find that this case is "distinguishable" from the *Black* case, which it purports to still recognize as law. We agree with Commissioner Elman that the cases are "indistinguishable" and the decision of the Commission to the contrary is unsupported in law.

The brief of petitioners has presented in a thoroughgoing and lawyer-like way petitioners' po-

sition. We are spared, however, the necessity of more thoroughly presenting their views and arguments by the fact that we find it sufficient to say that we adopt and approve the reasoning and the result in Commissioner Elman's dissenting opinion,[4] and particularly this concluding statement from it:

> This brings me to what is perhaps the most serious deficiency in the majority opinion. The duty of the Commission in this case was to determine whether Mary Carter had violated Sec. 5 of the Federal Trade Commission Act by engaging in any "unfair or deceptive acts or practices". Yet nowhere does the Commission explain what was "unfair or deceptive" about what Mary Carter did. The word "deceptive" appears in the Commission's opinion on page 2 in a description of the allegations of the complaint and again on page 10 in the observation that a good motive cannot justify a deceptive practice. But we are never informed as to who is, or might be, misled by Mary Carter's "Buy one and get one free" offer, or as to how that deception might be brought about.

Finally, Commissioner Elman noted[5] that the Commission's order to cease and desist was "indefensibly

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[4] *In the Matter of Mary Carter Paint Co. Inc. etc.*—FTC at page —.

[5] "The Commission's order prohibits respondents from representing:

"'(a) That any amount is respondents' customary and usual retail price of any merchndise when said amount is in excess of the price at which such merchandise is customarily and usually sold by respondents at retail in the recent and regular course of business'

'(b) That any article or merchandise is being given free or as a gift, or without cost or charge, when such is not the fact * * *'

"A reading of the order invites this question: What must respondents stop doing that they are now doing? Paragraph

vague", particularly in the light of the Supreme Court's recent call for Commission orders "sufficiently clear and precise to avoid raising serious questions as to their meaning and application".

It will be noted that throughout the briefs and arguments of the parties as to the error of the Commission, there is no claim that the Commission's error is in

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'(a)' declares that they may not call any amount their usual and customary price if it is in excess of their usual and customary price in the recent, regular course of business. Obviously, this has as little to do with the case as Guide V of the Guides Against Deceptive Pricing. Respondents have never sought to represent their 'recent' prices; they advertise only their current prices. As it happens, however, their current prices are the same as their recent prices. Whether regarded as a one-can or two-can price, respondents' advertised price of $2.25 per quart, for example, is their 'usual and customary retail price' NOW, and it is not in excess of $2.25 per quart, which is 'the price at which such merchandise is customarily and usually sold by respondents at retail in the recent and regular course of business'. Does this mean that paragraph '(a)' has no effect at all on respondents' advertising practices? Surely not, or the Commission would not issue it. But what effect does it really have, and how are respondents to comply with it? I confess I do not know.

"Paragraph '(b)' is almost as puzzling. Presumably, it is intended to require respondents to cease advertising 'Buy 1 and get 1 Free'. But this cannot be deduced from anything to be found in the terms of the order. As the Commission's own troubles with the problem show, the definition of 'free' merchandise is no easy matter. Yet respondents are ordered, on pain of heavy penalties, to cease and desist from describing merchandise as free 'when such is not the fact'. Surely this provision, like paragraph '(a)', is indefensibly vague, particularly in light of the Supreme Court's recent call for Commission orders 'sufficiently clear and precise to avoid raising serious questions as to their meaning and application.' Federal Trade Commission v. Henry Broch & Co., 368 U.S. 360, 368 (1962)."

its findings of fact. Indeed, there could not be because the facts as to what the appellants did were undisputed. There was no evidence to the contrary of what they proved that they did, so that we are not confronted here with any question of the presumption attending the Commission's findings of fact. The evidence presented no conflict which would form the basis of such a finding, and the sole question presented here is a question of *law for the court*, whether the Commission's conclusions from the undisputed facts are legally supportable.

In his annual message to Congress, January, 1936, the President, referring to the establishment of administrative bodies, declared:

> * * * in thirty-four months we have built up new instruments of public power. In the hands of a people's Government this power is wholesome and proper. But in the hands of political puppets of an economic autocracy such power would provide shackles for the liberties of the people.[6]

Some ten years later, the President transmitted to Congress, with his full endorsement and the statement that it was a great document of permanent importance, the report of his Committee on Administrative Management, which, because of the growth and intensification of administrative legislation of private enterprise and other phases of American life, he had created, appointing to it wise and earnest men. In transmitting the report he took occasion to say that the practice of creating administrative agencies, which perform administrative work in addition to judicial work, threatens to develop a fourth branch

[6] The Public Papers and Addresses of Franklin D. Roosevelt, Vol. 5, p. 16.

of the government for which there is no sanction in the Constitution.[7]

To this the Committee added:

> There is a conflict of principle involved in their make-up and functions. * * * They are vested with duties of administration * * * and at the same time they are given important judicial work * * *. The evils resulting from this confusion of principles are insidious and far reaching. * * * Pressures and influences properly enough directed toward officers responsible for formulating and administrating policies constitute an unwholesome atmosphere in which to adjudicate private rights.

In June, 1946, the Congress enacted, and on June 11, the President approved the Administrative Procedure Act,[8] and thus there had at last come about an Administro-Judicial Process established by legislative sanction and judicial approval.[9]

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[7] Cf. "All three existing arms of government being found inadequate to achieve the social purpose aimed at, a new type of body called a Commission, a government in minature, is set up." John Willis, University of Toronto Law School, Vol. 4, p. 60, Administrative Law, Selected Essays on Constitutional Law, Foundation Press, 1938.

[8] "An act to improve the administration of justice by prescribing fair administrative procedure." Chap. 324, Public Law 404, Laws of the 79th Congress, 2nd Session 1946.

[9] "An administro-judicial process, beginning with administrative adjudication of the facts and ending with a judicial adjudication of the law, both as completely aspects of one adjudicative process as are the adjudication of the facts by trial judge or jury and the adjudication of the law on appeal." Judging as Administration, Administration as Judging, Texas Law Review, Vol. 21, Nov., 1942.

"Under such statutes this court does not function as a tribunal exterior to the statutory administrative scheme, whose jurisdiction is invoked on constitutional grounds, to protect the applicant against the failure of the statute to provide due

Because, as we have held above, the Commission's decision and order are not in accordance with law, its decision and order are REVERSED and the Commission is directed to enter an order dismissing the complaint.

BROWN, Circuit Judge, concurring specially:

I am in full agreement with the Court's result and with much of its opinion written by my distinguished Brother Hutcheson. With no purpose to prepare a polemic or tithe "mint, anise and cummin," I would speak—"not as the scribes and Pharisees and the bureaucrats do," *cf. Thompson* v. *United States*, 5 Cir., 1964, * * * F. 2d * * * [No. 20214, May 27, 1964] (dissenting opinion)—but as a special concurring Judge should, a few brief words to indicate the views which lead me to decision.

At the outset I am not troubled about the so-called undemonstrated deception. One thing clear is that Mary Carter's paint is not really sold at any of the advertised prices. Thus, the price of $6.98 for the first gallon, the second one "free" is not the price at all for one gallon. Nor is it $3.49 (one-half of $6.98 for two gallons. Rather, it is $4.50, represented by the cost of two-one quarts ($2.25), getting for each, another "free" quart. For those who read and buy paint while running, I would suppose that Government might deem it appropriate to demand that at least one of the advertised prices be the correct one.

But at issue here is something more fundamental than house paint, bargains, or the American habit of self-delusion on "free" articles.

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process. It functions as the tribunal of last resort, set up in the statute itself, for the correction of errors of law committed, and not corrected, in the course of the administrative procedures." *Leebern* v. *United States*, 124 F(2) 507. *Cf. U.S.* v. *Morgan*, 307 U.S. at p. 191.

Our complex society now demands administrative agencies. The variety of problems dealt with make absolute consistency, perfect symmetry, impossible. And the law reflects its good sense by not exacting it. But law does not permit an agency to grant to one person the right to do that which it denies to another similarly situated. There may not be a rule for Monday, another for Tuesday, a rule for general application, but denied outright in a specific case.

That is what the Commission has done here. The precise action done here is permitted by *Black*, 50 F.T.C. 225 (1953). And even more unequivocal is the "Free Rule" [50 F.T.C. 235–236] patterned on it, but which has the positiveness of a rule, not a judicial-like opinion expounding a principle. These offers meet fully, honestly, and in good faith the requirement of Paragraph (2) found in each. Although Mary Carter's offer of the "free paint" is contingent on the purchase of a quart or a gallon, Mary Carter does not either (1) increase "the ordinary and usual price" or (2) reduce "the quality"; or (3) reduce "the quantity or size of the article of merchandise" which the customer is required to purchase.

Nevertheless, the Commission now holds that Mary Carter may not do what the Commission's two pronouncements clearly permit.

I am not arguing for *Black* in perpetuity. It may be bad or undesirable. The "Free Rule," emphatic as it is, may be worse. If so, the Commission should so declare. But so long as that is the rule, the Commission may not nullify it by individual decision while ostensibly holding it out as the standard for others.

With *Black* and the "Free Rule" not yet repudiated, Mary Carter is the victim of individualized

discrimination. So long as *Black* stands, so long as the "Free Rule" stands, paragraph (2) must be fairly applied.

As I did with the Interstate Commerce Commission in *Yellow Transit Freight Lines, Inc.* v. *United States,* N.D. Tex., 1963, (3-Judge), 221 F. Supp. 465, 469–71 (concurring opinion), I think the Federal Trade Commission has to make up its mind.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

October Term, 1963

No. 19982

MARY CARTER PAINT CO., A CORPORATION, JOHN C. MILLER AND I. G. DAVIS, JR., AS OFFICERS OF SAID CORPORATION, AND ROBERT VAN WORP, JR., PETITIONERS

v.

FEDERAL TRADE COMMISSION, RESPONDENT

Petition for Review of an Order of the Federal Trade Commission

Before HUTCHESON and BROWN, Circuit Judges, and CHRISTENBERRY, District Judge.

JUDGMENT

This cause came on to be heard on the petition of Mary Carter Paint Co., a corporation, John C. Miller and I. G. Davis, Jr., as officers of said corporation, and Robert Van Worp, Jr., for review of an order of the Federal Trade Commission, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged, and decreed by this Court that the decision and order of the Federal Trade Commission in this cause be, and the same are hereby, reversed and the

Commission is directed to enter an order dismissing the complaint.

"Brown, Circuit Judge, Concurs Specially."

June 19, 1964.

Issued as Mandate: July 13, 1964.

U. S. GOVERNMENT PRINTING OFFICE: 1964